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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Respondent, State of Washington, prays that the Court deny the Petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington entered May 6, 1971, which affirmed petitioner's conviction for exhibiting an obscene motion picture.

COUNTER — STATEMENT OF THE CASE

On August 30, 1968, a Richland police sergeant testified during a hearing conducted by Justice of the Peace Albert J. Yencopal concerning various scenes of the movie "Carmen Baby" which was then playing at a drive-in theater located in a residential area of Richland, Washington.

The purpose of the hearing was to determine if there was probable cause for the issuance of an arrest warrant for the manager of the drive-in theater (App. 47) for violation of Section 9.68.010, Revised Code of Washington, which provides:

> "9.68.010 Obscene literature, shows, etc. Every person who —
>
> (1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene, or
>
> (2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> Shall be guilty of a gross misdemeanor."

At the hearing, only a portion of which was transcribed, Justice of the Peace Yencopal, judicially scrutinized the complainant about the movie (App. 2) in a procedure designed to focus searchingly on the question of obscenity (App. 3). The police sergeant had previously viewed a portion of the movie on August 28, 1968, from outside the chain link fence enclosing the theater and practically the entire movie on August 29, 1968, from outside the theater in the company of the city attorney.

Upon a finding of probable cause an arrest warrant was issued and executed with the arrest of petitioner. As an incident to the arrest, and for evidentiary purposes, the film "Carmen Baby" was seized by the arresting officers.

The following is a chronological summary of the proceedings in Justice Court:

(1) On September 3, 1968, petitioner appeared in Justice Court with his counsel and entered a plea of not guilty along with a motion to dismiss which was taken under advisement (Tr. 23).

(2) On September 6, 1968, the case was continued without objection to September 13, 1968 (Tr. 24).

(3) On September 13, 1968, the motion to dismiss was denied (Tr. 24).

(4) On September 19, 1968, petitioner filed a motion to suppress (App. 51) which was followed by supporting and opposing briefs.

(5) Justice of the Peace Yencopal denied the motion to supress by written Order dated September 27, 1968 (App. 1-4).

(6) Trial was held October 3, 1968, before Justice of the Peace Yencopal sitting without a jury (Tr. 24) and petitioner was thereafter convicted of a violation of RCW 9:68.010.

Subsequently, petitioner gave notice of appeal and

the appeal process followed with a trial de novo in Superior Court resulting in petitioner's conviction based on the context of the movie's exhibition. On appeal the Supreme Court of the State of Washington affirmed.

ARGUMENT

The Petition for Writ of Certiorari should be denied for the reason that the court below considered and correctly interpreted the applicable decisions of this Court. The opinion (App. 21-38) of the court below is in accord with those decisions and settled principles of law. Furthermore, Respondent believes that this case lacks sufficient significance beyond its own facts to justify a further ennunication of those principles.

ARGUMENT AND ANSWER TO PETITIONER'S FIRST AND SECOND QUESTIONS

Petitioner questions whether he should be convicted under Washington's obscenity law when a movie containing erotic sex scenes is commercially exhibited by him in a drive-in theater in a manner permitting unwitting and unwilling persons to view portions out of context and in a manner which intrudes upon the privacy of non-consenting residents of nearby homes.

Assuming, *arguendo,* that the movie taken as a whole might not be obscene according to the guidelines established by this Court in *Roth v. United States,* 354 U.S. 476 (1957), numerous decisions of this Court and views of its members support the proposition that the setting

in which a material is placed, the manner of use and context in which it is displayed or viewed are relevant to the determination of obscenity. See *Redrup v. New York,* 386 U.S. 767 (1967), *Ginsberg v. United States,* 383 U.S. 463 (1966), *Stanley v. Georgia,* 394 U.S. 557 (1969), *Kingsley Books, Inc., v. Brown,* 354 U.S. 436, (dissenting opinion of Warren, C. J.), *Roth v. United States, supra,* (concurring opinion of Warren, C. J.), *Ginsberg v. United States, supra,* (dissenting opinion of Stewart, J. and footnote at page 649), *Mishkin v. New York,* 383 U.S. 502 (1966), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.,* 383 U.S. 413, 420 (1966).

This Court has also recognized a distinction between motion pictures and other forms of publication. Motion pictures, though within the basic protection of the first amendment, are not necessarily subject to the precise rules governing other methods of expression, *Freedman v. Maryland,* 380 U.S. 51 (1961) and because of visual impact, motion pictures of sexual scenes may transcend the bounds of constitutional guarantee long before a frank description of the same scenes in written words, *Landau v. Fording,* 245 Cal. App. 2d 820, 54 Cal Rptr. 177, *aff'd per curiam,* 388 U.S. 456. These distinctions peculiar to motion pictures suggest that the particular use or contextual exhibition is even more important in a determination of obscenity in the case of motion pictures. The court below relied in part on *Redrup, supra,* concerning "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure

to it". The case herein involves a drive-in theater exhibition which illuminates the nighttime sky of a residential area with a vivid portrayal of erotic sexual scenes. This is most certainly an obtrusive display practically impossible for residents and guests in nearby homes to avoid.

The holding of *Redrup, supra,* was reaffirmed in *Stanley v. Georgia,* 394 U.S. 557 (1969) and *United States v. Reidel,* 91 S. Ct. 1410 (1971) (concurring opinion of Marshall, J.).

Petitioner cites *Cohen v. California,* 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) in support of his petition for review. However, a reading of *Cohen* clearly indicates that it is distinguishable from the case herein. In *Cohen* this Court specifically pointed out that it was not an obscenity case and stated:

> "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some way, erotic. Roth v. United States, 354 U.S. 476."

Cohen also recognized a distinction between an unwitting viewer outside his home and one within the privacy of his home. It was the residents within their own homes that the court below correctly considered in reference to the obtrusive assault on their individual privacy.

ARGUMENT AND ANSWER TO PETITIONER'S THIRD QUESTION

The Washington State Supreme Court has carefully

and thoroughly reviewed the decisions pertaining to the procedures necessary to seize allegedly obscene material for evidentiary purposes. The opinion of the court below appears to be in accord with applicable decisions of this Court which are *Marcus v. Search Warrant of Property,* 367 U.S. 717 (1961), *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964) and *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968). The interpretation of the lower court is clearly ennunciated in its opinion set out in the appendix at pages 23-28. It is unnecessary to reiterate that analysis here.

Respondent believes a distinction should be made between a prior restraint aimed at suppression of large quantities of material as existed in *Marcus* and *A Quantity of Books* and a seizure for evidentiary purposes as existed in *Lee Art Theatre* and the case herein. If material is necessary for evidentiary purposes, it is quite easy to secure by purchasing a single copy of a book or magazine but impossible in the case of a motion picture.

Lee Art Theatre did not require a prior adversary hearing before seizure of a motion picture, but while recognizing First Amendment safeguards, did hold that seizure must be preceded by a judicial inquiry "designed to focus searchingly on the question of obscenity". This Court recognized the problems peculiar to motion pictures in determining "that a judge may read a copy of a book in a courtroom or chambers but not as easily arrange to see a motion picture there".

The procedures followed in the instant case clearly

meet constitutional safeguards and requirements of *Lee Art Theatre*. The justice of the peace conducting the inquiry has indicated:

> "Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative — so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did *judicially scrutinize* the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie — *obscene as defined by the Supreme Court in Roth vs. United States*, 354 U.S. 476 . . . the purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity.". (App. 2) (Emphasis added)

The justice of the peace did not accept the mere conclusions of the officer nor merely an affidavit from him, but rather took testimony regarding specific scenes of the movie and its content during a hearing only part of which was transcribed (App. 2).

The decisions of this Court do not support petitioner's contention that a full adversary hearing is necessary prior to seizure of a motion picture film. Assuming such a procedure were possible, then it would be unnecessary to seize the film at all as the issues would have been judicially resolved. Such a requirement would as Mr. Justice Harlan has stated: "Make ad-

judication not merely 'not as easily arranged' in the case of movies but quite impossible".

Petitioner also argues that the length of time this film has been impounded is a restraint of First Amendment rights, citing *United States v. Thirty-Seven Photographs,* 28 L. Ed. 2d 831 (1971). Petitioner fails to recognize that his case was tried by the justice court on October 3, 1968, some thirty-four (34) days after the arrest and seizure. The chronological proceedings previously set out herein, show the various motions which necessarily precluded an earlier disposition. Certainly the time required by the appeal process should not be a deciding factor. *Freedman v. Maryland,* 380 U.S. 51, 60 (1961) limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination, and *Thirty-Seven Photographs, supra,* suggested a seventy-four (74) day maximum. Petitioner's trial in justice court was held within thirty-four (34) days and a judicial determination entered within thirty-eight (38) days. See *Byrne v. Karalexis,* 27 L. Ed. 2d 792 (1971) and Mr. Justice Brennan's opinion joined by Mr. Justice White and Mr. Justice Marshall stating, "Freedman was satisfied by a 'prompt judicial decision *by the trial court*' ".

CONCLUSION

Respondent submits on the basis of the settled principles set out herein that the decision of the court below

is in accord with applicable decision of this Court and there is no need for further review.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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